the subject matter of availability of cash to meet expenditures, on December 31, 1948, according to the Government's Exhibit, there was cash in the account (2298) of $82,487.73. The gross of Mr. Costello reported in his tax return was $53,000, giving a total of $135,000, and the expenditures, as shown on the Government's exhibit, were $96,000.

These Exhibits 361-A through C are the Government's exhibits where they have analyzed those bank accounts, and you will see traced on them all of the money deposited with the exception of one item, I think, of $65.15 in 1946 and three items in 1949. One was $174 and two for $452. Otherwise the Government has documented every deposit in Mr. Costello's account.

Ladies and gentlemen, there was no income of Mr. Costello unreported. The Government cannot give you a single solitary cent. What they are asking you to do is to assume that money that they spent in excess of their income was from some earned source and, therefore, income rather than from something that they had had before, and the Government's proof as to the net worth is the key of that, and they have failed to establish Mrs. Costello's cash on hand; whether or not the $66,000 from Bayou belonged in that net worth statement. If it did, that alone covers it because it changes their figure and brings it up so that a case would be impossible. $5,500 on the original investment in Kastel, which the prosecutor told you (2299) was the amount in his opening, but the Government agents didn't see fit to give Mr. Costello credit for.

There is no proof that Mr. Costello, even on the assumptions of their theory, has not paid the Government every penny of tax due them; and with the additional allowances that the Government has now given him, credited to him under their own prepared tax returns, it is shown that Mr. Costello is due a refund in each and every one of these years due to the overlooking of the taking of proper deduc-

tions by the attorney who prepared the tax. And I must say that I want you to be sure; I have a great respect for Mr. Wolf, and I don't mean by one word that I say to indicate that he had not done his duty in preparing them. We all make mistakes.

Mr. Costello, ladies and gentlemen, is innocent of this charge, never should have been indicted, was indicted on hearsay, and I ask you to acquit him.

The Court: That concludes your summation, Mr. Fennelly?

Mr. Fennelly: Yes, your Honor.

The Court: Very well.

I think it would probably be better, ladies and gentlemen, if we recessed now for lunch. Mr. MacMahon (2300) will make his address to you after lunch. It is about twenty minutes of one, and I think if we get back here at 2 o'clock that will be about right and we will save a little time. That will give you the same time as you ordinarily would have.

Of course, I have been telling you all along to keep your minds completely open until all the evidence is in and you hear both sides and the Court, and I particularly remind you of that now because you have heard only one argument as to what the defendant claims the evidence shows. So don't be talking about the case among yourselves or with anybody else during lunchtime. Keep your minds completely open.

We will resume at 2 o'clock.

(Recess at 2.00 p.m.)

(2301) AFTERNOON SESSION

SUMMATION ON BEHALF OF THE GOVERNMENT.

Mr. MacMahon: Judge McGohey, Mr. Foreman, and ladies and gentlemen of the jury: The Government has proved that Frank Costello cheated and defrauded the Government out of income taxes of at least $52,000 for the tax years 1946 through 1949.

Now, when we made our opening statement we promised you that the Government would prove that Frank Costello wilfully evaded his income taxes in each of those years. We told you that we would prove this by what he spent and by proving to you that he spent a lot more money than he reported on his income tax returns in those years. We also told you we would prove it by what is known as the net worth expenditure method.

Now, the essence of this method is that you prove that a man is spending more than he is reporting on his income tax returns and that he did not have the money to start with. Now, how do we find out what Costello had to start with?

We proved to you what he was worth on October 18, 1937, and we did it by using the world's best expert on what Costello was worth at that date—Frank Costello (2302) himself. We showed you and read to you a statement that he gave under oath to an official representative of the United States Treasury.

Now, counsel has suggested that this was something of a careless statement, that Costello was caught unawares. Well, ladies and gentlemen, this statement, Exhibit 23, is signed on every single page. You will recall that Costello came back the next day, he read over the statement and he initialed it, and he signed it, on every page, he made corrections in it, and he changes "brother" to "brother-in-

law," he initials the change; he makes another correction over here (indicating), "Kastel wanted to see me make some money. Frank Costello." And so on throughout. He had time to think about it, ladies and gentlemen, and he did.

And then we went on to prove that from that time, October 18, 1937 up until December 31, 1945 Costello spent and invested over a half a million dollars, and that this was $202,000 more than he reported on his income tax returns for that period.

Think what this means! From 1937 up to the first prosecution year, January 1, 1946, Costello spent $202,000 more than he reported on his income tax returns.

We promised you that we would prove exactly what Costello was worth on January 1, 1946, and we kept (2303) track of those resources year by year, we found out what they were and we kept track of them year by year, from 1946, 1947, 1948 and 1949, and we proved to you that in those four years Costello invested and spent $330,000 out of income and that he reported on his income tax returns less than half that amount.

Think of this! In this four-year period, Costello reported less than one half of the taxable income he received. He received income that he did not report in the amount of $158,000.

How did we go about proving this case? We proved these investments and expenditures of Frank Costello by calling 150 witnesses to that stand. Who were these witnesses? They were his lawyer, they were his accountant, they were trades people, storekeepers, mechanics, barbers, tailors and so on, and more than that, we proved this case by over 365 documents that were received in evidence. What kind of documents were these? These were public records, deeds, mortgages, bank deposit slips, bank records, checks, cash sales slips, cash books, ledgers, and affidavits, and sworn testimony of Frank Costello.

And we promised that after all these witnesses had testified and all these documents had been received in evidence that we would put an expert on the stand to (2304) do the arithmetic. We put Mr. Leath and Mr. Sohn on the witness stand and they did that arithmetic.

There are a lot of figures in that arithmetic, but it is simply a matter of two and two make four. That arithmetic is on the schedules which have been received in evidence here as Exhibits 362 and 363. They summarize all the details of this proof. They aren't just cold figures. For every figure on those exhibits you heard a witness testify or there has been a document received in evidence.

Those schedules and any other documents in this case are available for you during your deliberations. If you want them, all you have to do is ask for them, and I hope you do.

There has been a lot of evidance here going back to 1935, 1936, 1937, but the important year here is 1945. How much did Frank Costello have in hand at the end of 1945? That is the important figure.

The purpose of going back to 1937 and tracing Costello's assets was to show you what happened to them and to show you that they weren't on hand and available to spend during the prosecution years from 1946 through to 1949.

We traced Costello's financial dealings up to December 31, 1945 to give you a solid beginning net (2305) worth to go into the prosecution years.

What does the proof show about this period from 1937 up to 1945? The proof shows that Frank Costello spent or invested out of his current income over $202,000 more than he reported on his tax returns.

Now, this is a large figure, and it is very significant. It is this figure, $202,000, which guarantees the accuracy of the opening net worth in December 1945.

Before the defense can make any attack on the starting point net worth in December 1945, they have to explain away that $202,000.

Summation on Behalf of The Government

How do they go about explaining away this $202,000? First, they complain that the Government has put in $9,500 for Costello's investment in the Phil Kastel partnership on October 18, 1937. They say the figure should be fifteen thousand, a difference of five thousand five hundred because Kastel in 1939 testified that he had put in $15,000; but in 1937, two years closer to the event, and remember his records were memorized, he said that he put in $9,500. That is the figure we used.

The next point of attack is the 1937 Cadillac Costello said he had on October 18, 1937. Mr. Gearhart from the Cadillac Motor Company took the witness stand, (2306) he brought his records with him, and he told you that that Cadillac had cost about $4,500. He also told you that it was turned in in 1941 for $250. So we know that Costello did not get any of this excess, $202,000, out of selling that Cadillac.

The next item the defense questions does not stand up any better. Costello reported income from the Kastel partnership in 1937 of some $66,000, and the defense argues that the Government has not given Costello credit for this money. The evidence shows that this money had been received by Costello before October 18, 1937, before he gave his statement.

And what was left of it was in the $30,000 cash that we give him credit for. You will remember that Mr. Matheny, the agent from Mississippi, told you that he had seen the Bayou books. Now, those books weren't produced. Mr. Matheny saw them, and he told you that the last installment of this money, some $12,000, was in Kastel's hands by June of 1937. Under Costello's arrangement with Kastel, Costello was entitled to half of the money. Costello, himself, said in October, when he gave his statement, that he got his money from Kastel weekly, monthly, regularly, and that the last time he got anything from Kastel was about three months before and that he got it in cash. (2307) So we

submit to you that that cash was on hand at the time he gave that statement.

So the evidence shows that none of these items should be included in the net worth. But let us assume the contrary. Let us assume that these items, which total some $76,000, should be included. What does this do to the December 1st, 1945 starting point? It does nothing. It simply reduces the unexplained $202,000 by that amount and it still leaves $120,000 to go before you affect that opening net worth in December 1945 by so much as a dollar.

Now, the only other item that the defense questioned during this period from 1937 up to the end of 1945 was the money Costello spent for flowers at Annenberg & Erickson, $2,000 a year. Now, Mrs. Leichner, the lady who ran that flower shop, told you that Costello spent that money during that period, that her records had been destroyed. But was she likely to forget a customer who spent that much money in her store? But the most interesting thing about this flowers business is not the $2,000 a year. There never was any account in that store showing that Frank Costello spent any money for flowers. The account was carried in the name of C. Frank. And you all remember the trouble we had trying to show who C. Frank was. I am (2308) sure you haven't forgotten Miss Takata. How many other accounts are there around town in the name of C. Frank or some other fictitious name that the Government was never able to find? Ask yourself that question when you retire to the jury room.

Now, the only defense witness here was Mr. Sweeney. He prepared a couple of schedules that he was hired to make. The first one was marked HH, and Mr. Sweeney claimed that this schedule showed that Costello had some $84,000 cash on hand in December 1945. But you will remember that this figure started to melt away on cross examination. First of all, it turned out that the figure

included the bank balances of some $29,000. Then it turned out that it included the $27,200 that Costello had lost in the taxicab and which Sweeney said was some kind of an escrow account. And then there were some other items which Mr. Sweeney admitted were in error, and after all these corrections we had him compute and total them up for you on the witness stand, and that $84,000 melted to zero. That schedule, ladies and gentlemen, was a phony.

If you will, think back to the way Sweeney acted on this witness stand. Did he give frank, straightforward answers to straightforward questions (2309) or did he evade? I ask you to listen to his Honor when he charges you on how you judge the credibility of a witness. Mr. Sweeney's only function and the function of his schedules was to confuse you and to mislead you. And I am sure you won't be fooled by it.

So the plain fact is here that the proof establishes that the net worth starting point on January 1, 1946 is wholly accurate and completely sound.

Now, let us come to the prosecution years. The proof shows that in the year 1946 Costello's income was $53,000, but he only reported a little over thirty-five thousand.

The proof shows that in the year 1947 Coste[illegible]'s income was over one hundred and two thousand but f[illegible] the same year he reported a little less than $37,000 on his income tax return.

The proof shows that in the year 1948 Costello's income was over $70,000 but he reported less than half of that, about thirty-three thousand.

The proof shows that in 1949 Costello's income was over $91,000 but his 1949 tax return shows less than thirty-eight thousand.

Thus, during the prosecution years Costello (2310) had income, according to the proof, of at least $317,000. During those same years he reported on his tax returns income of

$158,000. Think what that means. It means that during the years covered by the indictment Costello concealed from his Government over $158,000 in income. Based only on the expenditures that we were able to find and to prove, Costello concealed over half of his income during this period.

Now, let us look at the few items the defense questions on the schedules covering the prosecution years. First, there was the matter of the adjustments made to the change in net worth in 1947 and in 1948 in order to account for losses suffered in those years.

Now, the thing to notice there is that that adjustment is to the change in net worth, not the net worth itself. Those losses were subtracted from the net worth, and when you make that subtraction at first blush it seems that that is money that you drew out of something and had available to spend. But you and I know that you can't spend money you have lost, you can't use it any more. And to state and to show that accurately and truthfully when you come to compute the change in net worth, you have to add that figure back in there because you know you didn't get any money from (2311) that source to spend.

Now, the only other item the defense questioned was the investment in Louisiana Mint Company as it was shown on the net worth schedule for January 1, 1946. The argument is that the investment in Louisiana Mint should have been shown at about $5,000 more than it was on January 1, 1946, because the money was distributed to Costello in December 1945. The trouble—because no money was distributed to Costello in 1945. The trouble with the argument is that the books of Louisiana Mint show that the money was distributed in December 1945. You heard that exhibit and that page from the books read a dozen times during the course of this trial, and the books say "Distributed in December."

Now, the defense argues that Murphy's report to Costello does not show this distribution and that his cash balance

would be off if that distribution had not in fact been made. But the trouble with this argument is, Murphy would not have any way of knowing whether his cash balance was off or whether it wasn't. He is a certified public accountant, but he is not a mind-reader. Murphy told you that he didn't even know where the cash of Louisiana Mint Company was kept, he was never allowed to count it; so he had no way of verifying cash.

(2312) You also remember that Murphy told you that sometimes Kastel would make the distribution to Costello and then Kastel would come in and tell Murphy that he had made it and then Murphy would enter it on the books. Now, isn't it perfectly plain that that is what happened here? Kastel made the distribution in December and he came in in January and he told Murphy about it, and Murphy put it down in the books "Distributed in December."

Now, Mr. Sweeney in his schedule covering the prosecution years prepared what he called a cash receipts and disbursements schedule, and in doing so he accepted some of the Government's figures. But the only thing wrong is that he accepted the figures which were to his advantage and he left out the ones that hurt the defense. The result was that by taking some of our figures and disregarding others he wrote up a schedule that gave a completely false picture of the calculation he claimed to be making.

You will remember that Mr. Sweeney's schedules start each year with a cash balance figure and then he computed what the cash balance should have been at the end of the year. He explained that the words "cash balance" included the amount of cash in the banks.

(2313) Now, a perfect example of what is wrong with Mr. Sweeney's schedule is that he computes the total amount of the cash balance at the end of 1945 as $20,000, while if you add up the bank balances shown on the records of the various you will find that there was over $67,000 on

deposit in the banks at that time. Now, Mr. Sweeney says there only should be twenty. The banks say they had sixty-seven thousand. A difference of $47,000. And if you make the same comparison at the end of 1948 you find that Sweeney is off another $15,000 from what the banks say.

Now, I don't know whose word you are going to take, but do you think the banks would have set up this total of $62,000 more than Sweeney says they should have had unless those banks actually had that money? And if you think about it for a minute you suddenly realize that the difference between what Sweeney says the cash balance should have been and what the cash balance actually was is the income that Costello did not report on his tax returns.

The same fact hits you squarely in the eyes when you look at some of the figures Sweeney put on his schedule. He lists a large amount of bank deposits from unidentified sources and he concedes that those were cash receipts. He shows over fourteen thousand in 1946, over eighteen thousand in 1947, over twelve (2314) thousand in 1948, and over four thousand in 1949.

Now, he labeled these non-taxable receipts, but he admitted that he based that conclusion on the bank statements. Now, I ask you when you go to the jury room to look at those bank statements and see if you find any such label on the statements.

You have to take all the evidence in this case to determine whether those are taxable or non-taxable cash receipts.

The Government has proved what Costello's true income was during the period from 1946 through to 1949. Agent Sohn took the witness stand and he computed the tax on that true income and, in doing so, he gave Costello the benefit of every doubt. He gave him every deduction for which there was any possible basis, even though Costello himself had not claimed it on his original tax return.

The total amount of tax Costello evaded during these four years was $52,239.

Summation on Behalf of The Government

The Government proved that in 1946 Costello concealed $18,000 of his income and thereby evaded $1,143 in taxes.

In 1947 Costello concealed $68,798 of his income and thereby evaded taxes of $13,786.

In 1949 Costello concealed $37,832 of his (2315) income and thereby evaded taxes of $14,746.

In each of these years the Government has proved that Frank Costello evaded a substantial portion of his tax and his Honor will probably charge you that that is all that is required on that phase of the case.

You have seen throughout this trial witness after witness take this stand and testify that the records had been destroyed, and don't forget all those cash deals where there aren't any records. It must be plain to you that we only been able to prove a fraction of Frank Costello's true income for this period.

Let us take a look 1946, for example. In these expenditures for 1946 there is only one item for food, $8.46 to the Milkman. $8.46 for food in a year in which the Costellos spent over $8,000 to maintain their residences at 115 Central Park West and at Sands Point and almost $2,000 for clothes. Was that all the money they spent for food, $8.41? What part of your budget goes for food?

And look at the telephone bills. We show $51 in 1946, 1947 and 1948, but in 1949, the only year where there were available records, we have proved almost $450, nine times as much.

(2316) Let us look at another year. Over $7,000 was spent for clothes in 1947 and $11,000 to maintain their residences compared with less than a thousand dollars for food and nothing for gas and oil for their car, or for the movies, or for entertainment, or for dining out. Ask yourselves, if a husband and wife, who spent so much money for clothes and hotel bills and their two homes, could spend

only a thousand dollars a year in those years for food for themselves and for two maids.

As I have said before here, the evidence shows that from 1937 through 1949 Costello spent over $202,000 more than the amount he reported on his tax returns. And the evidence shows that during the years 1946 through 1949 the excess was over $150,000. So for the whole period from 1937 through to the end of 1949, the excess is over $350,000, and the Government's proof shows that none of this was reported as income.

Where did this money come from? You cannot tell precisely where it came from; and his Honor will tell you, I believe, that we don't have to. But you can get some pretty good ideas where this money came from from the evidence in this case. It came from gambling, it came from cash dealings, and from cash businesses, and it came from miscellaneous.

(2317) Let us take some of the particular places where it could have come from. Let us take Louisiana Mint Company. Louisiana Mint Company was a slot machine business, run by Kastel down in New Orleans. The way the slot machine business works, Murphy told you, is that you put slot machines out in locations and you divide the profits with the locations. And it is a big money business.

The defense has made a great show of the fact that Kastel reports every penny of income shown on the books of Louisiana Mint Company. Of course he did. His figures had to agree with the figures shown on those books. But how were those books made up? They were made up from recapitulation sheets that didn't even show the names of the man who collected the money from those slot machines. Those collection slips were never shown to Murphy, their own accountant. All he had was Kastel's word in the form of those recapitulation sheets.

Yet every penny, down to how much it cost for news-

papers, is supported by an underlying bill or a voucher or a memorandum. You saw those exhibits. We passed them to you at the time.

Now, the juke box business, that was put in Mrs. Costello's name, did have collection slips, showing (2318) how much money was taken out of each machine. Where are the slips that were signed by the people who took the money out of the machines for the Louisiana Mint Company? Why weren't they shown to Murphy, their own accountant? Just look at this company. It never had a bank account. Murphy told you he didn't even know where the cash was kept; that he was never allowed to count it.

Kastel got some of his distribution from the Louisiana Mint Company in cash, and when Murphy sent money to Costello, Murphy got the cash from Kastel. Isn't this one way Costello could have got some of this extra income?

Now, take the other Louisiana venture, Beverley Country Club. That was a plush gambling casino, the plushiest one in the South, and it operated during the post-war boom. And gambling casinos are big money businesses.

This gambling casino has the most elaborate records imaginable to support how many steaks were served, how much the hatcheck girls got, the number of tips the waiters got, the number of drinks that were served across the bar, it has adding machine tapes, bar checks, inventory records, cash register tapes, supporting vouchers, voucher registers, three and a (2319) tons of records to support an enormous loss on the restaurant end of the business.

What did it have to support the income and the receipts of the gambling casino? Pencilled sheets of paper made up on a daily basis, but they were only entered into the permanent books in ink once a year. Murphy told you that he had authority to write checks on the restaurant bank account but they kept him away from the casino. Why? Unless they had something to hide or conceal. Murphy told

you that those summary sheets on the profits of the gambling casino had to have underlying memoranda in back of them; and if you look at them, you will see they are all odd numbers. You couldn't possibly carry them in your head; you would have to have underlying memoranda. Murphy never saw them; you never saw them.

Murphy also told you that the casino loaned money to its customers. He told you that he never saw the accounts receivable, and neither have you. There is no way of telling how much was loaned, how much was paid back, who paid it back and when they paid it back. We are left completely in the dark about it. Why? What was there to hide and conceal?

Then there is this miscellaneous on Costello's (2320) tax returns. We know miscellaneous was from gambling income but the big thing we don't know about miscellaneous is how much was that gambling income. Who was there around to check what your gambling income is? There is no employer to take it out of your pay, the way you or I have to pay our taxes. There is somebody to check on how much money we get. Who was to check on Costello on his gambling winnings and his "miscellaneous"?

The defense speculates that all of these excess expenditures, $350,000 worth of them, were made out of money that belonged to Mrs. Costello. It is plain that they weren't made out of any income Mrs. Costello had. Costello himself testified and admitted that Mrs. Costello had no income from 1937 through to 1944, and that she had no income from 1947 through to 1949, and that the only income she had for the years 1944 through 1946 was the income she reported on her tax return.

You will remember that on the schedules we showed you, Exhibits 362 and 363, we allowed Costello credit for every penny of Mrs. Costello's income. We subtracted that right out of the picture, and when we did that, I think you will

agree, we gave him the benefit of the doubt. And by doing so, we made absolutely sure that the rest of those expenditures (2321) came from his income. Because that is absolutely sure, the defense is forced back to the argument that Mrs. Costello had cash on hand before October 18, 1937 of some $350,000 and that this money was still being spent in 1949.

Right on the face of it, that argument is ridiculous. There isn't a shred of evidence in this case to support it, and there is plenty of evidence that Mrs. Costello had no such nest-egg hidden away under the mattress or in a teapot some place.

On October 18, 1937 Mrs. Costello had a bank account which was kept at the Hudson River branch of the Corn Exchange, and the balance in that bank account was about $1,100, and we give Costello credit for that $1,100 in the starting point 1937. That is the only bank account she had.

The defense has kept suggesting that she had another bank account at the 86th Street branch of the Corn Exchange Bank, but their own exhibit, defense Exhibit GG, shows that that was not so. The exhibit says in plain English that the account was previously maintained at that other branch.

And if you will recall, the transfer was made right at the time the Costellos moved from the neighborhood of the old bank to the neighborhood of the new one. (2322) So isn't it plain to you that this bank account that we found is the only one in existence at that time?

Let us look at some of the other evidence in this case that shows that this is a fiction and a figment of the defense's imagination. On October 18, 1937 there were outstanding income tax liabilities against the Costellos running back to 1926. Those were being paid off on the installment plan, $300 a month. And meanwhile, those tax lia-

bilities were running interest at 6 per cent, and they weren't paid off in full until 1947.

If Mrs. Costello had all this cash, why was this debt left hanging over their heads so long at 6 per cent interest?

In 1941 a Cadillac was bought in her name, and it was purchased on the installment plan, just like anyone else buys a washing machine or a television set, and you don't do that if you have got $350,000 cash.

Costello borrowed on his life insurance policy. Isn't that the last place you would go when you need cash? Do you borrow on your life insurance if your wife has got $350,000 cash?

And then, why did he have to borrow $50,000 from Frank Erickson in the prosecution years if she had $350,000 cash? And he paid Erickson 4 per cent interest. (2323) You don't do that if you have got ready access to $350,000 or any part of it.

The defense asks you to take at its face value the assertion that the investments and expenditures in Mrs. Costello's name were made with her own money. Let us take a look at some of these and see whether it was her money or Costello's money.

The first investment in her name was a house and lot in Southold, Long Island for $4,000. That was made in 1940, and before Mrs. Costello had one penny of income of her own. She had a bank account at that time but there is no withdrawal to match in date and amount that $4,000. Where did she get the money? Who was getting the cash at this time? Her husband, Costello.

The next investment was the Crescent Music in 1943, and this investment was made in cash. The agreement that you have seen says so. And there is no withdrawal from Mrs. Costello's bank account to match that investment.

(2324) And the interesting thing about that agreement, ladies and gentlemen, is that it is the only partnership

agreement we have seen in this case, and I suggest to you that it is a mighty handy record for the defense to have. Why weren't there such formal agreements on all these other partnerships with Kastel and Meyer Lansky down in the Beverley Country Club and in the Louisiana Mint Company? That is the only formal partnership agreement in the whole case, and it was made, that $10,000 investment, before Mrs. Costello had any income or money of her own to make it.

Then in 1944 there was the purchase of the house at Sands Point. This was paid for with $18,000 in cash. You heard Mrs. Adoue on the witness stand tell you that. Costello was present when the $18,000 was handed over. Once again there is no withdrawal from Mrs. Costello's account to match that $18,000. And it was made, that investment, before she had received any income from any place.

Now, the next income in her name was the one at 79 Wall Street, which was bought for $52,500 in cash, and the defendant delivered that money to George Wolf. The only difference between 79 Wall Street and these other investments is that, for some reason, Costello admitted that he owned the stock in 79 Wall Street (2325) Corporation. By this time, the time of this 79 Wall Street investment, both of them had bank accounts; and there is no withdrawal from either account to match that $52,500 investment.

Every single one of these investments was made in Mrs. Costello's name before she had a penny of income from Crescent Music Company. And every one of them was made in cash. And who was getting the cash during this period? Costello. He testified in 1937 and 1939 that he was getting cash from Kastel regularly.

Now, let us take the Consolidated Television investment made in 1947. The defense argues that this was an investment of Mrs. Costello because some of the money was returned to her after the investment was withdrawn. But it

was Costello who turned the $22,000 in cash over to George Wolf, and the investment was made in Wolf's name, not Costello's. Once again there is no withdrawal from either of their bank accounts to match this $22,000. And Wolf testified that he got the money from Costello in cash. And you remember, later on Costello gave Wolf another $5,000 to make a loan to Consolidated Television, and once again this was in cash. And there is no withdrawal from his account or Mrs. Costello's to match that $5,000.

(2326) Now, let us take the purchase of the lots in Hollywood, Florida, in 1948. You remember there the deed ran to Dudley and Ann Geigerman, Mrs. Costello's brother, but remember Geigerman was also Costello's partner in these various Louisiana gambling ventures. And look at the way that transaction was handled. Within a few weeks after the deed to Geigerman there was a quit-claim deed made to Mrs. Costello, but it was not recorded for a whole year. If you went to the public records to find out who owned that property you didn't find Costello, you found Geigerman. They didn't even tell the lawyer, Beckerman, down there who the real purchaser was.

Now, is there any reason for concealing the purchase of a piece of property, unless you have got something to hide? And here, again, there is no withdrawal on either of their bank accounts to match the purchase price, $20,000, on those lots.

Wolf testified that he represented the Costellos from 1943 through to the end of 1949, yet he never received a fee from Mrs. Costello. All of them were paid by Frank Costello.

Now, what about the expenditures? Throughout the trial—

Does your Honor want to recess at this time?

(2327) The Court: Will that be agreeable to you?

Mr. MacMahon: It is all right.

The Court: All right, we will take a recess.

(Short recess.)

Mr. MacMahon: I was just commending to talk about the expenditures. And you noticed throughout this trial that the defense has made a great show out of accounts in the name of Mrs. Costello. Now, as far as the ordinary expenditures are concerned, we know that that is nonsense. It is the wife ~~who~~ does the shopping but it is the husband's money which pays the bills, and there is plenty of evi-

In 1937 Costello testified that his wife was dependent dence to show that that was the case here.
upon him. In 1939 he testified that he gave his wife all the money that went into her bank account.

In 1943 he admitted through his attorney that he gave her all the money spent for their living expenses, such as rent, clothes, insurance, food and so forth, and that he gave her the money that bought that 1941 Cadillac.

The application for Mrs. Costello's life insurance reveals that she was dependent upon Costello for support. Some of the drawings from the Louisiana Mint Company went into her ~~bank account~~, but that was in Costello's name, Louisiana Mint Company. Some of (2328) the salary from 79 Wall Street went into her bank account. In 1948 and 1949 withdrawals from his bank account go into her bank account. When we have Recordak checks we don't have them for most of this period. There are, regularly, monthly checks from his account to hers.

Now, even Mr. Sweeney admitted on cross examination that the defendant Costello gave Mrs. Costello sixteen thousand to put in her bank account in 1949, $17,700 in 1948. And, besides that, look at all the cash deposits in that account in 1947 and in 1946. The plain fact is that the

money in Mrs. Costello's bank account actually belonged to Frank Costello.

Now, any argument here, the speculation, that Mrs. Costello had this hoard of cash, $350,000 on hand before October 1937, is ridiculous. If there was anything to it, all the defense would have to do is call a credible witness to that witness stand to testify to it.

Ladies and gentlemen, I suggest to you that that argument is an insult to your intelligence.

Now, what about the other aspect of this crime? His Honor will charge you that the Government must show that this evasion was wilful. You see what I have in my (2329) hand here. These are checks, ordinary garden variety checks. You and I use them every day. They are easy to send through the mail. They protect against theft and they make a record of payment. They show on whose account the money was drawn; they show to whom it was paid, and the endorsements on the back show where the money was deposited or where it was spent. These are the accustomed mode of payment in this day and age. And Frank Costello knows that.

But there is one other thing about these little slips of paper. They are the most important leads that you can find when you come to investigate income tax evasion. And without them it is almost impossible to prove fraudulent concealment of income. And Costello knows that. He knows that these checks are used for payment and that they make good records. That is how these checks came into existence. There is $22,000 worth of checks here.

But the strange thing about these checks that I am holding in my hand is that you won't find Costello's name any place on any one of them. They are signed by George Wolf. Costello knew that if his name was on these checks it would be easy to prove that he invested $22 000 in Consolidated Television. You don't have Wolf making these

checks just for Costello's convenience. (2330) Costello had a bank account right around the corner from his home. Why didn't he use it? Instead of that he walked; he goes all the way down to 30 Broad Street three times to deliver $22,000 in cash.

Then there was another significant thing about this Consolidated Television. You will remember that Wolf testified that half this investment was withdrawn and that he got a check from Consolidated Television for $11,000; Costello told him to cash the check and give the cash to Costello. Why? Can there be any other reason than the fact that Costello wanted to conceal the investment in that company; that none of these checks would lead to him?

And then there was another $5,000 loaned in this Consolidated Television thing, and again it is Wolf's check, not Costello's.

Look at the way he avoids using his bank account where records are made and where you can trace and find his expenditures and his investments.

How many others are there made like this where there is no record to show it? Where the cash is delivered and the checks are in someone else's name? We'll never know.

Costello knows that records can be very helpful if you want to establish something, but he knows how to (2331) avoid making them when you don't want anything to show.

Look at the deposits in his own bank account, every single one of them by check. In those deposits you will find all the income he received per these books, and his income very neatly agrees with it. There's a record in the bank. He wants to establish that. You will find in his bank account the checks from George Morton Levy that he got for keeping bookmakers off the track. There is a record there.

You won't find any checks from "miscellaneous" in that bank account, or any identifiable deposit that in any way

matches that income miscellaneous that was kept on slips of paper, that he didn't even show to George Wolf, his own lawyer, when he made out his income tax return. Isn't it obvious that he was concealing his income, and doing so deliberately?

Costello knows that when you want to dress up your income tax return, checks make very good records. He even had special checks for his charity accounts, deductions. He wanted to establish that record. And don't be fooled by it, ladies and gentlemen. It is a built-in sympathy argument in the defense to this case. If you will look at those charities, you will see that they are designed to hit right at a New York jury and the people who sit on New York juries. And (2332) they were intended for just the very purpose that they have been used in this case.

But, now, ladies and gentlemen, just because you give a few thousand dollars to charity, that doesn't give you a license to cheat and defraud your Government out of income taxes that you owe. And bear in mind that in computing this tax, we've given Costello the deduction for every single one of those contributions that we can trace to his name. Those funds were commingled and we had to separate them out so that we wouldn't be charging him with any greater expenditure than was actually his. And that is why we went through that long process of separating out what was actually his money from money he had collected from others, simply so that we wouldn't be charging him with greater expenditures than were actually his, and to give him the benefit of every doubt.

Don't be confused here by the other items of deduction that Costello didn't take on his income tax returns. There were plenty of good reasons why he didn't take them.

Let us look at the sales tax, for example. If he took those sales taxes as the deduction on his income tax returns he would expose every single one of these expenditures,

and he would be spending more money, (2333) far more money, than he is reporting on his income tax return, and when the revenue agent examined that return, he would see that, and he would find the fraud. That is why he didn't take that deduction.

And he didn't claim any deduction for his safe deposit box for the same reason, he didn't want to reveal that he had one.

And then there was $25,000, ten thousand of it in 1946 and fifteen thousand of it in 1947, that he spent to a law firm of Greenbaum, Wolff & Ernst, for tax advice. Those deductions were not taken. They were plainly allowable by law. Why didn't he take them? Because it would show that he had that other $10,000 in 1946 as income, and it would show that he had it in 1947, another $15,000, income. That is why he didn't take them. And don't be fooled by that fact.

There is another one here, so-called over-payments of his taxes. Don't be fooled by that. He paid taxes on what he reported, not on what he did not report. Those are what he claimed were overpayments not what, in fact, were overpayments.

When he signed that tax return, he did the same thing you and I did, he certified under penalties of perjury that it was true, and the Government had a right to rely on that, just the same as it does with (2334) you or with me. Did the Government make him call a hundred and fifty witnesses in a courtroom to prove that he was entitled to that refund? No, it took his word. It relied on what he said, and it was entitled to do that.

And those so-called overpayments were calculated to mislead the Tax Collector and confuse you and fool you, and I don't think you are going to fall for it.

There is another good example of how Costello knows that checks make very good records when you want. Look

at those Erickson loans, $25,000 in 1946 and $25,000 in 1949. Every single payment of principal or interest on those loans is made by check. Why? Because that is not taxable income, if you believe that those loans were ever made, and he wanted to establish that for use on this very trial. And he was thinking about it way back there in 1946.

Look at how elaborate that loan is set up: Formal notes, formal receipts, an elaborate exchange of correspondence, documented step by step. Yes, Costello knows that records can be made. He knows how to make them when he wants them.

Bear in mind there has been no witness here to testify one penny of that money ever was paid to Costello (2335) by Erickson; and if you don't believe those loans, there is $25,000 more income in 1946 and $25,000 more in 1949; and look at them, ladies and gentlemen, and ask yourself, "Isn't this just a bit too perfect?"

Once again we have got an example of how Costello knows how to make records when he wants them. Look at that Crescent Music Company partnership. Very elaborate and written agreement but, as I pointed out before, it is the only one you have seen in this whole case.

He knows that these records are useful when he wants to show something but he knows how to avoid making them, when it shows concealment of his income, and he did it time and time again in this case.

That is the reason the deed in Florida was taken in somebody else's name. You had to make a public record there. You had to record that deed. That is why it was in somebody else's name. That is why he did all this business in cash. He wanted to hide how much money he was receiving and how much he was spending. That is why he gave George Wolf $53,000 in cash in fifty and hundred dollar bills.

Do you go around making investments in cash, $53,000 worth of them? Does anyone else who is being honest on their tax returns do that? There is only (2336) one reason for all this cash and that is to wilfully evade these taxes, to conceal it.

He gave Wolf $9,500 in cash on that tax lien. He gave him another $7,000 in cash to pay back some old judgments. He paid Wolf $13,000 in cash for legal fees. And he avoided, by using cash, the making of the usual records of payment.

Look at the length to which he was willing to go to conceal how much income he had: Even when it came to building a mausoleum, all in cash, $18,000 worth of it. And the record? The record is in the name of Amilcare Festa, not Frank Costello, and if you cannot find Amilcare Festa, or if he won't come into court and testify, how in the world are you ever going to prove that Costello spent the $18,000? And Costello knows that. That was an innocent transaction.

There is only one reason for dealing in cash. There cannot be any other, and that is to cheat and defraud the Government of the United States, the same Government that gives him the opportunity to make this money, and to ride around in his Cadillac, and to have his two homes, and to have two maids. Can you sink any lower than that?

And look at the way he concealed his income from gambling with that great big word "miscellaneous." (2337) Do you put "miscellaneous" on your income tax return? You wouldn't dare. Neither would I nor anyone else.

We could not look an honest taxpayer in the eye if we let him get away with this.

When he buys the property, he puts it in Wolf's name, Consolidated Television, the property in the Geigerman's name, businesses in his wife's name, all of that. The only purpose for that is to conceal his true income.

Even with a hundred and fifty witnesses and three hundred and fifty exhibits the Government has been extremely lucky to be able to prove this man's expenditures and income after the way he has handled his transactions to conceal and hide the truth. For years he has tried to keep this evidence from you and from a courtroom. It has taken years of investigation to catch him, and now we have got him, ladies and gentlemen. That evidence has been presented in this courtroom and it proves that he evaded this tax.

Maybe I have talked too long, but if I have, I have done so out of zeal for my client, the United States of America and 160 million people who look to our courts of law for the fulfillment of their sense of justice or for the utter shattering of their confidence in our institutions.

(2338) If the Frank Costellos can get away with this scheme to defeat and defraud the Government out of income taxes, then the honest taxpayers of this country will break their backs carrying the load for these easy money Costellos.

In short, ladies and gentlemen, the question for you to decide is whether it pays to cheat and defraud your Government out of income taxes, and I think that is a question we can safely leave in your hands.

I ask you to return a verdict of guilty on all counts as charged.

I thank you.

The Court: Very well.

Now, ladies and gentlemen, you are going to be excused until tomorrow morning at 10.30. I again urge you to keep your minds completely open. You haven't heard the Court's charge. Don't try to make up your minds as to the guilt or innocence of the defendant until you have heard that. Certainly don't talk about it among yourselves and certainly

don't talk about it with anybody else, and if you should happen to see anything about it in the newspapers, I ask you not to read it, so you can devote yourselves to the case, when the case is submitted to you, on the basis of the evidence alone.

(2339) 10.30 tomorrow morning.

(The following proceedings took place in the robing room:)

The Court: Let the record show that at the request of the defendant Government's Exhibit 365, which is a computation by the witness Sohn, the income tax which the Government claims should have been paid in the year 1946, based on all of the evidence and the exhibits introduced prior to the introduction of 365, Schedule E, item 2, which contains merely the word "miscellaneous" has had added to it, in parentheses, the word "Beverley Country Club," on the consent of the Government, so as to make the exhibit fairer to the defendant, as Mr. Fennelly claims it would not be without "Beverley Country Club" inserted.

Now, Mr. Fennelly, you have a request for an additional request to charge.

Mr. Fennelly: Yes, your Honor.

The prosecutor in his summation has asserted that the $202,865.81 appearing on Government's Exhibit 362 was money spent for investments and expenditures, and he has stated to you in conference in chambers and arguing against the admission of the assessments for 1941 through 1945 that that sum of $202,865.81 had disappeared and vanished and was expended by December (2340) 31, 1945.

Now, it appears on the face of the exhibit that of that amount twenty-seven thousand two hundred was in the New York City Property Clerk's possession and $29,506.71 cash on hand in banks. So that neither of those

items has been expended or invested, and that reduces the two hundred and two thousand to $146,000.

And, then, in using the example that he did, of taking the other items that I said should be included in the original net worth or at least two of them, he said if you added seventy-six thousand to the net worth it still wouldn't make any difference. Your Honor will see that if you added another seventy-six thousand to the net worth there would only, on those figures, be an amount of about seventy thousand necessary to have had on hand, and I think you ought to charge the jury that Government's Exhibit 362 shows on its face that the two hundred and two thousand was not all expended, that these two items totaling fifty-six thousand odd are still on hand. And I say that further to you because one of the Government prosecutors cross examined the witness to develop the same facts, and that the Government cannot take the postion both ways in fairness to the defendant.

The Court: As I understand the argument made (2341) this afternoon it was not quite as you stated, Mr. Fennelly. The argument was made that if, as you had suggested in your summation, the defendant should be given credit for these various items that you mentioned—I think one of them was $5,500 and another was the sixty-six thousand and another was the value of the 1941 Cadillac and the other is the twenty-seven thousand two hundred, that the net worth as of January 1, 1946 would not thereby be affected, that, according to the manner and system used in computing 362, giving those credits would result merely in a reduction of the figure two hundred and two thousand and that the net worth would remain the same.

Now, there is argument for the jury, and the jury will be charged that it is for them, as I indicated in connection with the requests of all of you, that it is for the jury to determine the accuracy and the integrity and the validity

not only of the figures but of the theories used to make up the Exhibits 362 and 363 and the supporting schedules and then the various exhibits which consist of the tax returns as prepared by Sohn. And I decline to charge the jury as you have just requested.

Mr. Fennelly: May I point out to your Honor that the prosecutor's statement, as you say, it is an (2342) obvious fallacy, must change the net worth if you have an additional seventy-six thousand.

The Court: It is not obvious to me, and it may not be obvious to the jury. It is rather obvious to me, unless I have completely misapprehended the theory on which 362 was prepared, that it would have the result which the Government says it would have and not the result which you say it would have. However, that is a matter for the jury to determine, and I shall not usurp their function by telling them that it must do something, particularly when I think they shouldn't.

Mr. Fennelly: I respectfully except.

The Court: Oh, yes. You have an exception to every adverse ruling.

Mr. Fennelly: (To Mr. Delaney) Have we a charge about net worth?

The Court: You have a request I think to charge that net worth is the difference between assets and expenses.

Mr. Fennelly: I would ask your Honor to charge—

The Court: I don't recall now; my recollection with respect to that charge on net worth is that I didn't state that I would give the charge in the form you asked (2343) it, as I recall it. We had quite some discussion about it yesterday afternoon here.

Mr. Fennelly: Then may I ask your Honor for one further charge and that is that a true net worth statement must include every asset and every liability as of the date of the statement?

The Court: I will hear you on that.

Mr. MacMahon: Your Honor, that simply is not the fact on the net worth computation of income. That may be the fact if you go down to the bank to state your assets and liabilities. For example, there it would include your outstanding tax liabilities to the Government. Mr. Fennelly makes no point that that item is omitted here. The point is that you only make a statement of those assets on a computation income by the net worth method which serve as a source of funds available to spend and no others. Therefore I respectfully ask your Honor not to charge that.

The Court: I decline to give the charge as you requested, and you have an exception.

Mr. Fennelly: Exception.

The Court: Now, you had a request.

Mr. MacMahon: We have one, your Honor, in view of defense counsel's summation to the jury on the insufficiency of the indictment here. We would like—

(2343-A) The Court: You need not worry about that. I will charge the jury that the sufficiency of the indictment and the manner in which it was obtained is not before the jury and they are to disregard it.

Mr. MacMahon: All right. It is a matter of law for the Court.

The Court: That is right.

Mr. MacMahon: Thank you.

(2344) DEFENDANT'S REQUESTS TO CHARGE

No. 1. You are to infer nothing adverse to the defendant from the fact that the Grand Jury has indicted him. An indictment is a mere charge or accusation against the defendant and is not evidence. No juror in this case should permit himself or herself, to any extent whatsoever,

to be influenced against the defendant because of the indictment. An indictment is merely the means of bringing a defendant to trial.

No. 2. The defendant is presumed to be innocent. This presumption of innocence is one of the most important rights which the law accords all persons accused of crime. This presumption of innocence attaches to the defendant and continues with him through all stages of the trial and throughout all the stages of your deliberation until it has been overcome by competent evidence and until the guilt of the defendant has been established by the evidence beyond a reasonable doubt.

You are required, therefore, to give careful and weighty consideration to the presumption that the defendant here on trial is innocent of the accusation made by the prosecution against him, and if, after (2345) consideration of the evidence in the case, you have any reasonable doubt as to the guilt of the defendant, it is your duty to acquit him.

No. 3 The Government must prove beyond a reasonable doubt that there is a substantial or large portion of the tax due from the defendant for the particular year in question, from 1946 through 1949, and that the defendant has wilfully attempted to evade or defeat payment of his income taxes for that year, and if the Government has failed to prove beyond a reasonable doubt either of these two elements for any such year, you must acquit the defendant on each such count.

No. 4. Unless you find beyond a reasonable doubt that the defendant wilfully intended to evade the payment of his income taxes, you cannot convict on any of the counts. Intent is an essential ingredient of this crime. By wilfully is meant an act done intentionally, purposely and deliberately, and with a bad intent and purpose.

Defendant's Requests to Charge

No. 5. The term "reasonable doubt" means a doubt of such quality as were to arise in your private lives in connection with some important decision required to be made by you but cause you to pause, (2346) hesitate and ponder in that decision. So, if when all the facts and evidence in this case have been considered by you, you are not abidingly persuaded and convinced through a moral certainty in your own conscience that the defendant is guilty, you have a reasonable doubt.

No. 6. Reasonable doubt does not mean that you are required to give anyone the reason for your doubt or to explain to any person the reason for your doubt.

No. 7. Mere probabilities or suspicions are not sufficient to warrant a conviction. You are not concerned with probabilities or suspicions, but only with evidence.

No. 8. You and you alone are to draw what inference, if any, are to be drawn from the testimony. You may accept or you may disregard such inferences, if any, as the Court or counsel on either side may draw from the testimony. You may accept such inferences as accord with your own conclusions from the evidence, and disregard all others.

No. 9. You are not to be influenced by the number of witnesses who have testified on behalf of the Government. It is the weight of credible evidence, or the lack of it, and not the number of (2347) witnesses which should guide you.

No. 10. You are the sole and exclusive judges of the evidence and of the credibility of the witnesses. If you find that a witness has testified falsely, you may disregard that portion of his or her testimony and believe other parts, or you may disregard his or her entire testimony.

Defendant's Requests to Charge

No. 11. In determining the credibility of witnesses you may consider what has been their attitude, promptness and candidness in the course of their examination, and what impressions they have made and left with you—whether good or bad.

No. 12. Any information obtained by you from sources other than the evidence introduced at this trial, whether they be newspaper accounts of this trial or other sources of information, must not be considered by you in reaching a verdict.

No. 13. In this case, Government agents have testified on behalf of the Government. You are not to give any added weight to the testimony of such witnesses merely because they are government employees.

No. 14. The Government must prove beyond a reasonable doubt that the defendant owed a tax (2348) liability as to each of the four years for which the defendant has been indicted. It must further prove that the additional income, upon which a tax was due, was income in the particular year in which the alleged wilful attempt to evade taxes was made. The Government must further show that such income, upon which a tax was allegedly due, did not come from principal or assets of the taxpayer or his wife which he or she previously had, and that such income was not from gifts or loans or other non-taxable receipts or reported income of the defendant or his wife.

No. 15. In a net worth case the starting point, which in this case is October 18, 1937, must rest on a solid foundation. That is, the prosecution must establish beyond a reasonable doubt the net worth of the defendant and his wife as of that date with certainty.

If the Government fails to prove the net worth of the defendant and his wife as of such date, beyond a reason-

able doubt with certainty, the remainder of the proof is meaningless and the defendant must be acquitted.

Net worth means the value of all of the (2349) assets of the defendant and his wife, less their liabilities as of a given date.

No. 16. Proving the receipt of taxable income from increase of net worth, or expenditures or from a combination of the two is really the use of circumstantial evidence. The burden rests upon the Government to prove its case not only beyond a reasonable doubt but to the exclusion of every reasonable inference of innocence. Evidence of mere probability of guilt, of course, is not sufficient.

No. 17. This case is based entirely upon circumstantial evidence. I, therefore, charge you that every circumstance must be proved and not presumed. Each circumstance must be consistent with every other circumstance; must be only consistent with the guilt of the defendant and inconsistent with his innocence. If there are two inferences to be drawn from the circumstances—one pointing to guilt, the other to innocence—it is your duty to adopt the inference of innocence and acquit the defendant, even though the inference pointing to guilt may be equally weighty.

No. 18. If, after considering all of the evidence in this case, you conclude that the facts (2350) established by the prosecution are as consistent with innocence as they are with guilt, it is your duty to render a verdict of not guilty and acquit this defendant, for you may not pass a verdict of guilty in this case unless the facts proven by the prosecution exclude to a moral certainty every other hypothesis but that of guilt.

And where the facts or circumstances are susceptible of two inferences—one pointing to innocence and the other

pointing to guilt—it is your duty to adopt the inference pointing to innocence and acquit the defendant.

Evidence that is only sufficient to raise a suspicion or conjecture unfavorable to the accused is not sufficient to support a conviction.

No. 19. No expenditures made by Mrs. Costello shall be considered in determining the taxable income of the defendant in any year, unless you are satisfied beyond a reasonable doubt that the expenditure was made with money Mr. Costello had received as taxable income during the year in which the money was spent by Mrs. Costello.

No. 20. A wife is recognized in law as independent and is entitled to have money and own property of her own and to dispose of it as she sees fit.

(2351) No. 22. It is your duty to confer with your fellow jurors and to discuss the evidence with them, but the verdict which you render must represent the real judgment and honest conviction of each of you, and I charge you upon your oaths that each of you has the duty of arriving at his or her own conclusion and no one should surrender his or her belief concerning the guilt or innocence of the defendant for the purpose of preventing a disagreement or arriving at a compromise.

No. 23. Government witness, Wilfred T. Leath, has testified from his recollection of the testimony and from exhibits and prepared schedules. If he has made any statement, or has made an entry in the schedules which does not accord with your recollection of the testimony or is not in accord with the exhibits, then it is your recollection and not his schedules that should guide you.

If his schedules are based in part or in whole upon testimony which you do not believe, you are at liberty to ignore that portion of his schedules reflecting such evidence which you do not believe, or you may ignore all of his schedules.

It is your (2352) recollection and your determination of which of the adduced evidence is credible which controls, since you are the sole triers of the facts.

No. 26. The action of the Court during the trial in passing upon motions made by counsel for the defendant or overruling objections made by counsel for the defendant or in sustaining objections made by counsel for the Government is not to be taken by you as any indication of the guilt or innocence of the defendant. Counsel for the defendant not only has the right, but is charged with the duty of objecting to the introduction in evidence of any testimony or exhibit offered by the prosecution which counsel for the defendant may believe under the rules of evidence should not be admitted. Such rulings are merely matters of procedure, having no relation to the merits of the case, and with which you have no concern.

No. 27. For the period from 1926 to 1932 no Federal gift tax was imposed.

(2353) New York, May 13, 1954,
10.30 a.m.

CHARGE OF THE COURT

The Court: Now, ladies and gentlemen of the jury, the very first thing I want to do is to compliment you for your punctuality all during the trial and for the attention which you gave to the evidence and the arguments.

Jury service, as you all know, is a very important part of civic duty, and it is a very important matter when you are called on to pass on the guilt or innocence of a person charged by the Government with crime. And the

attention that you gave to this case suggests that you are quite aware of the importance of that duty and you have done your best to discharge it appropriately. So you have the thanks of the Court at the very opening of the charge.

We have come to that part in this case where it has to be submitted to you for decision, but before (2354) that is done it is my duty to instruct you on the law to be applied in the case.

In our system of trials there are some functions which belong to the Court alone and there are other functions which belong to you, the jury, alone, and each of us must be careful to avoid intruding upon the other's exclusive province.

You, the members of the jury, that is, the twelve jurors to whom this case will ultimately be committed, are the exclusive judges of the facts and of the credibility of the witnesses and of the weight of the evidence, but you must take from the Court the law which must be applied to the facts as you find them.

And so at the very outset, I say to you that the sufficiency of the indictment in this case, which Mr. Fennelly commented on yesterday afternoon or yesterday morning, I guess it was, in his address to you, is of no concern to the jury at all and you are not to consider that question in your deliberations because that is a question of law, and you are not required to pass on questions of law.

So you are to put that matter entirely out of your minds.

(2355) Finding the facts is merely a process in which you, the jury, first consider the testimony of all the witnesses, together with all the exhibits that have been received in evidence, and then, by drawing such inferences of fact as your experience and your common sense tell you the evidence supports and justifies, you determine just what is the truth in the case.

I shall give you some rules of law which you must ob-

serve in that process, but the job of making the determination of what the true facts are is yours and yours alone.

Thus, if counsel for either side has asserted something to be a fact, or if I do in the course of these instructions, you are not bound by that and, indeed, you should disregard it unless it accords with your own determination after considering all the evidence and the exhibits which you recall.

Moreover, you must not draw any inferences for or against either side in this case because of rulings that were made by the Court during the trial. Those rulings related to matters of law which, again, are outside of your province, and, therefore, do not concern you at all.

And you must not infer from the fact that I (2356) asked questions from time to time that I have any opinion whatever as to the facts in this case. Whenever I asked questions I did so only because I thought it might save time, or because I thought it might be helpful in clarifying the testimony, but not at all to indicate that I have any personal opinion whatever as to the facts in this case.

Indeed, I have tried carefully to avoid giving any such impression, but if anything I have said or done has nonetheless given you such an impression, I ask you to take my assurance that you are mistaken about that and put it out of your minds completely. You must make up your own minds as to what the true facts are from a consideration of all the evidence which has been received and which you recall.

Remember, in that connection, that it is your recollection of the evidence that counts. Counsel in their arguments to you have reviewed the evidence as they recall it. You are not bound, however, to accept their recollection of the evidence, nor mine either, if I should give it during these instructions. You are bound only to consider the evidence as you yourselves recall the evidence.

You are the sole judges of the credibility (2357) of the witnesses, I have said. Credibility, of course, is just an-

other word for believability. When you undertake here, in passing on this case, to determine the credibility or believability of any witnesses who appeared before us here, you are only doing something which is a common, everyday mental operation for every one of us. From time to time we all do things or abstain from doing things because of our reliance or lack of reliance on the word of some other person or persons.

In making up your minds whether or not you believe any witness, you may, and I should think you would, take into consideration certain obvious factors, one, has he some interest in the outcome of the case which will be served by getting you to accept what he says as true? Did he impress you from his demeanor on the stand as a frank and truthful and honest person? Did he impress you as one who knows what he is talking about? Is his testimony credible in the light of all the other evidence which you believe? Is it credible in the light of your own common experience in life?

You may have other or additional tests which you apply in your ordinary affairs of life, and if you (2358) have any such tests, you will apply them here just the same as you would in any of the ordinary affairs of life.

If you believe, for instance, that any witness has lied to us here, you may disregard every word of his testimony or you may accept such as you believe to be true and disregard only what you believe is false.

The fact that a witness may have an interest in the outcome of a case does not mean that his testimony is necessarily false. To be sure, it may be false, but it is not necessarily so.

However, when a witness has an interest in the outcome, that may cause him even unconsciously to color his testimony so as to serve his interest. It may cause him to recall more clearly those circumstances and events

which promote his interest rather than those which do not. Then, too, some witnesses may have a greater and more immediate personal interest to serve than others. You may take all these possibilities into account when you are considering this matter of credibility.

Bear in mind you are not bound by what counsel thinks of the witnesses' credibility, nor by mine, if I should say anything in these instructions which (2359) you think indicates an opinion of mine as to anybody's credibility. You and you alone are the sole judges of the credibility of any and all witnesses who appeared.

Now, you are also the sole judges of the weight of the evidence. Judging or determining the weight to be given the evidence is also a common experience. The weight of evidence means merely its power to persuade you of the truth of the proposition in support of which the evidence was offered.

Your determination, then, should, as a matter of common sense, be based on a test of the quality of the evidence and not on mere quantity of exhibits or number of witnesses or the length of time that any witness was on the stand.

You frequently have to make judgments of this kind, I am sure, in your ordinary daily affairs and, again, proceed here as you do in your normal activities.

Of course, it must be obvious to you that the same tests of credibility are to be applied to all witnesses alike, whether they are called by the Government or by the defendant, and whether they are employed by the Government or employed by (2360) the defendant.

I suppose this is appropriate to say at this point, too, that this equality of consideration applies also to counsel in the case. Counsel for the Government stand in no different position here before us than counsel for the defendant, and I am sure counsel for the Government don't

claim any special preference. In any event, they don't have it.

This is, as you know, a criminal case. The defendant, Frank Costello, is charged in the indictment with four distinct violations of a section of the statute of the United States called the Internal Revenue Code. That section, 145(b), provides in substance that any person who wilfully attempts in any manner to evade or defeat his income tax or the payment thereof shall be guilty of a felony.

I shall read the indictment to you. So that there is no question about it, I shall read it, as well as I can, word for word and not summarize it.

Count No. 1. On or about the 14th day of March, 1947, in the Southern District of New York, Frank Costello, the defendant, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946 by (2361) filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue collection district of New York, in the Borough of Manhattan, City of New York, a false and fraudulent income tax return wherein he stated that his net income for the said calendar year was the sum of $23,673.90 and that the amount of tax due and owing thereon was the sum of $8,338.72, whereas in truth and in fact, as he then and there well knew, his net income for the said calendar year was the sum of $31,630.54, upon which said net income he owed to the United States of America an income tax of $13,224.88.

The second count: On or about the 9th day of March, 1948, in the Southern District of New York, Frank Costello, the defendant, who during the calendar year 1947 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by

him and his wife to the United States of America for the calendar year 1947 by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue collection district of New York, in the Borough of Manhattan, City of New York, a false and fraudulent joint tax return on behalf of himself and his said wife, wherein it was stated that their (2362) net income for the said calendar year was the sum of $17,307.23, and that the amount of tax due and owing thereon was the sum of $5,085.94, whereas in truth and in fact as he then and there well knew their joint income for the said calendar year was the sum of $72,561.45, upon which said net income there was due and owing to the United States of America an income tax of $41,215.53.

The third count: On or about the 14th day of January, 1945, in the Southern District of New York, Frank Costello, the defendant, who during the calendar year 1948 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948 by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue collection district of New York, in the Borough of Manhattan, City of New York, a false and fraudulent joint income tax return on behalf of himself and his wife, wherein it was stated that their net income for the said calendar year was the sum of $12,325.30, and that the amount of tax due and owing thereon was the sum of $2,153.48, whereas in truth and in fact, as he then and there well knew, their joint net income (2363) for the said calendar year was the sum of $47,619.92, upon which certain net income there was owing to the United States of America an income tax of $15,965.22.

And the fourth and last count: That on or about the 10th day of March, 1950, in the Southern District of New

York, Frank Costello, the defendant, who during the calendar year 1949 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1949 by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue collection district of New York, Borough of Manhattan, City of New York, a false and fraudulent joint income tax return on behalf of himself and his said wife wherein it was stated that their net income for the said calendar year was the sum of $22,110.70, and that the amount of tax due and owing thereon was the sum of $4,910.94, whereas in truth and in fact, as he then and there well knew, their joint net income for the said calendar year was the sum of $61,739.18, upon which said net income there was owing to the United States of America an income tax of $23,521.40.

Bear in mind that that is only the indictment, (2364) and that the indictment is merely a charge made by the grand jury that the defendant has committed the crimes alleged there.

An indictment is no proof whatever that the defendant committed any crime at all, nor is it evidence of any kind against him and you must not draw any unfavorable inference against him because of it. Its function is to inform him of the charge and to bring him into court to answer.

The defendant Frank Costello has answered the charge by denying it. Accordingly, and this is a rule of law which you must bear in mind and observe, the defendant is presumed to be innocent here of the charges alleged in the indictment, and that presumption of innocence remains as to each of the charges made in the indictment until such time, if that time ever arrives, as all twelve jurors, after full consideration of all the evidence are satisfied beyond a reasonable doubt that he is guilty of the charge.

Accordingly, if, after considering all the evidence in the light of these instructions, you determine that the facts, as you find them in this case, are as consistent with innocence as with guilt, the defendant should be acquitted.

And you must not draw any inference adverse (2365) to the defendant because he did not take the stand. The defendant, bear in mind, is not required to prove his innocence. On the contrary, the burden, under our system of law, is upon the Government to prove each element of the crimes charged and to establish the defendant's guilt to your satisfaction beyond a reasonable doubt.

You will note that there are three elements which must be present to constitute each of the offenses charged in the indictment, one, a tax must be due from the defendant; two, there must be an attempt to evade the tax or the payment thereof; three, the attempt must be wilful.

It is not claimed here that the defendant paid no tax at all in each of the prosecution years. Rather, the claim is that in each of those years he had substantial taxable income over and above what he did report; that by not reporting such additional income he attempted in each year to evade the tax that was due thereon, and that in each year the attempt was not merely an oversight or an error, but was wilful, which means that the defendant in each year had the specific evil intent and motive to evade the tax due on such alleged additional taxable income.

That is the charge in each of the four counts.

(2366) Accordingly, in order to find the defendant guilty on any count, you must be convinced beyond a reasonable doubt that all three elements were present, namely, that a tax was due in the year covered by the indictment, that the defendant attempted to evade the tax, and that he did so with a specific evil intent to effect the evasion.

If you are not so convinced as to any year, you must acquit him on the count covering that year.

Wilful intent to violate the law must be established. The question of the wilfulness is one of fact to be determined by you from all the proven circumstances.

The gist of the offense is wilful attempt to evade any substantial part of the tax due. The precise amount actually due need not be proved.

Mere failure to make a complete and accurate report of income tax for taxation is not enough to support a verdict of guilty. The failure must be wilful in the sense that it was an attempt to evade thereby payment of income taxes which would have been shown by a correct return to have been lawfully payable, but the wilfulness of the defendant need not be established by direct proof.

The proof of the setting in which the false (2367) returns were filed can supply an adequate basis for finding that the attempt to evade payment of taxes was wilful.

Accordingly, then, in determining the question of wilfulness, you may consider such evidence as you recall and believe as to the use of large sums of cash by the defendant in his dealings, purchase of property, of investments by the defendant in other people's names, large sums of money and cash not deposited in bank accounts, keeping a safe at home; the failure of the defendant, if you find that there was a failure, to give his attorney information necessary to make out accurate returns in connection with income from wagering, and any evidence that you recall that the defendant did not keep adequate records, and the defendant's general mode of carrying on his business.

With respect to the matter of records, it is for you to say whether on all the facts, all the evidence that you recall, and the findings that you make on that evidence, whether under all those facts and circumstances the defendant did or did not keep adequate records. The adequacy of the records is a matter for your determination.

Whether a tax was due in any of the prosecution (2368)

years depends, of course, on whether the defendant had additional income in that year which was subject to tax.

The Government has not attempted to show receipt of particular items of income and failure to report such particular items. The Government has proceeded here on a theory of reconstructing income, which is called the net worth expenditure method.

Net worth, as used here, as I understand the Government's theory, means the total of resources available for investments and expenditures.

This method involves determination of the defendant's net worth at the beginning and end of a period in order to foreclose the possibility that the expenditures were made, or the net worth increases were derived, from prior accumulated funds.

The underlying theory is that if the expenditures, together with any changes in net worth, exceeded the reported income in the period, the inference may be drawn that the defendant's total income was not properly reported.

You will note that I have said that an inference may be drawn. I don't mean thereby to suggest that you should draw an inference or that you should not draw it. It is for you alone to draw such (2369) inferences as you think the evidence rationally supports.

It is obvious, I think, that under this theory, the net worth of the defendant as of January 1, 1946, January 1, 1947, January 1, 1948, and January 1, 1949, which are the prosecution years, must be fixed with reasonable accuracy. It is for you to determine from all the evidence whether or not it has been determined accurately in this case.

Furthermore, it is for you to determine the validity and correctness of the various schedules received in evidence, and the various calculations made by the witnesses who testified to having made those calculations, and the various assumptions, if you find that any assumptions were made.

As I recall the testimony of the accountants, certain assumptions were made, but it is for you to determine from your own recollection what the evidence is.

The Government has undertaken to fix the starting point as of October 18, 1937, and its calculations of the defendant's unreported income are based on the assumption that the opening net worth accounts for all the resources of the defendant and his wife at that time, but it is for you to determine whether all the resources of the defendant and his (2370) wife as of October 18, 1937, and in each of the prosecution years, have in fact been included in the opening net worth for each of those years.

You may bear in mind, in considering this question, that the opening net worth may be established either by direct or circumstantial evidence, or a combination of the two.

If you find that the evidence does not establish the fixed starting point with reasonable accuracy, then all the calculations based on that starting point would be in error.

If you find such errors to exist; it is for you to determine what effect, if any, such error has on the ultimate figure of additional taxable income computed for any of the prosecution years.

The gross income of a taxpayer and the net income are not the same, and the income tax, as I am sure you all know, is due only upon the net income and not upon the gross income.

Gross income includes gains, profits, income derived from salaries and wages, compensation for personal services of whatever kind and whatever form, from professions, vocations, trades, businesses, commerce, or sales or dealing in property, whether real or personal, growing out of the ownership of, (2371) use of, or interest in the property, also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profit and income derived from any source whatsoever.

That is in accordance with the revenue act.

Net income is gross income less statutory deductions. Statutory deductions include business expenses, interest payments, taxes paid or accrued within the taxable year, losses sustained during the taxable year, capital losses, debts ascertained to be worthless and charged off in the taxable year, wagering losses, if applied against wagering gains, depreciation and charitable contributions.

In order for you to find that sums received by the defendant during any of the taxable years constituted income to him, it is not necessary for the Government to have proved the exact source of the income.

None of the alleged excess investments and expenditures made by the Costellos during any year shall be considered in determining the taxable income of the defendant Frank Costello in any year unless you find that there was an excess of expenditures and investments, and that it constituted money which the defendant received as taxable income during the (2372) year in which the money was spent.

Regardless of how much money or property a wife may have of her own, she is entitled to receive support from her husband and is generally referred to as a dependent. We all know that.

In considering this question of whether or not, as claimed by the Government, the expenditures of Mrs. Costello constituted the expenditures of money belonging to the defendant, you may take into consideration any of the statements which you recall made by the defendant. As I recall it, I think there was one made in 1937, and then, as I recall it, there was another one made in 1939, and I think also there was some statement made by Mrs. Costello herself in an application for some insurance. You are not bound to accept my recollection, but that is what I recall of the matter. That is the testimony as I recall it. And you may

take those or any other evidence bearing on that point into consideration in order to determine that question of whether or not the money spent by Mrs. Costello was money of her own or if it was money that came from her husband.

One of the theories of the defense here, of course, is that the purchases made by Mrs. Costello (2373) were in her name and were actually made with her money rather than with money supplied by the defendant, but it is for you to decide whose money was actually spent in these expenditures and investments by Mrs. Costello or in her name.

The fact that a person has spent a considerable amount of money does not prove that he owed an income tax on that amount, nor does the fact that the money was deposited in a bank prove that such money was liable for income tax. However, evidence of the possession and the expenditure of money during the years 1946 through 1949 may be considered as part of a chain of circumstances which you may consider in arriving at whatever conclusion you do arrive at as to whether or not the defendant enjoyed taxable income in the years 1946 through 1949.

That is, I think, the second time where I mentioned circumstantial evidence, and I suppose it will be more helpful if at this point I tell you something about circumstantial evidence.

Evidence, as I am sure you understand from your own affairs in ordinary life, may consist of direct testimony as to a fact, or it may be testimony as to circumstances from which the fact may be inferred. The latter is called circumstantial evidence. (2374) It is evidence which tends to prove or disprove a disputed fact by proof of other facts which have a natural and reasonable tendency to lead the mind to a conclusion as to the existence or non-existence of the disputed fact.

And so I rather imagine that from your own experience you are all familiar with this mental process.

In your deliberations, if you find, by drawing natural and reasonable inferences from circumstantial evidence, that certain facts have been established, if you do, those findings of fact will be just as valid as the finding of fact you make from direct evidence.

In either event, in order to find the defendant guilty, you must be satisfied from all the evidence, whether it be direct or circumstantial, that he is guilty beyond a reasonable doubt. And if you are not so satisfied, you must acquit him.

During the course of the trial certain exhibits with parts blocked out were offered and received in evidence. The matters blocked out were blocked out because they were not material in any way to any of the issues which you are called upon to determine. And so you are not concerned with any of those parts (2375) blocked out, and you are to draw no inferences for or against the defendant, or for or against the Government's claim by reason of those blockings-out.

That again is one of those matters of law which the Court passed on, and you, therefore, are not concerned with the form in which those exhibits were received.

Now, a good deal of the testimony at the end of the case came from the accountants who testified before us here as experts, and they gave their qualifications.

As a general rule, witnesses at a trial are called in order to testify about such facts as they know of their own knowledge which are relevant to the issues of the trial. Thus, such witnesses are permitted to testify only as to such facts and, as a rule, they are not permitted to express opinions. However, sometimes it happens, as here, that issues of the trial involve some subject which lies within a field of specialized study, here the field of accounting.

In such a case experts, that is, persons who have special knowledge and experience in that field, are permitted to testify to their opinions on that subject. This is permitted because, since the purpose of a trial is to discover truth, and as (2376) experience and common sense show, it may aid the search for truth to have the advice and opinion of one experienced and versed in the field which embraces the subject at issue.

This does not mean at all that you must inevitably accept experts' testimony. You should and you must, of course, give it careful consideration just as you give all other testimony in the case, but you are the sole judges of the credibility of an expert witness, just as you are the sole judges of the credibility of any other witness and you, therefore, are required to give an expert's testimony only such weight as you think it deserves in the light of all the testimony in the case.

You should, of course, for instance, consider his qualifications and the reasons he has given for the opinions he has expressed.

You must remember that an expert does not, and as a matter of law cannot, pass on the truth of the alleged facts included in any hypothetical questions which are presented to him.

It is your function exclusively to determine which, if any, such alleged facts are true. Indeed, in most instances an expert has no personal knowledge of the facts in the case at all. He is merely asked (2377) to assume certain facts as true, as to which other evidence has been received, and then, having made that assumption, to give his testimony.

Accordingly, therefore, since you are the exclusive judges of the facts, you are free to reject his opinion, if you find that a hypothetical situation presented to him was incomplete or incorrect.

And since you are also the exclusive judges of the weight or persuasiveness of the evidence, you may reject his opinion if you believe that his reasons are unsound or unconvincing.

So, in summary, it is your function carefully to consider, to compare and to weigh all the evidence as you recall it and, in the light of your experience and common sense, to draw from it such inferences of fact as are natural and reasonable.

Then, from all the facts as you find them to determine whether or not the defendant is guilty of any or all of the charges made against him here.

But before you can find the defendant guilty, as I have said two or three times during these instructions, you must, from your consideration of all the evidence, be satisfied beyond a reasonable doubt that he is guilty.

If you are not so satisfied, then you must (2378) bring in a verdict of not guilty.

What then is reasonable doubt? Well, in the first place, it must be an actual doubt and not a mere possibility of doubt, and, as is obvious from the term itself, it must be based on reason. Moreover it must arise from the evidence or lack of evidence as you recall and evaluate it. It can never arise from mere whim, or caprice or from sympathy, or from a disinclination to perform what may be or may be thought to be an unpleasant duty. It is the kind of doubt that would cause you to refrain from making an important decision, or taking some important step in some serious matter in your own personal affairs.

Accordingly, if your consideration of the evidence, in the manner I have just described, produces in your mind a settled belief of the defendant's guilt, with such certainty as you would act upon in your own important affairs, then you would be free from reasonable doubt.

This does not mean that you must have absolute or

mathematical certainty because, as I am sure you all know from your experience, there is hardly any proposition in life which is capable of (2379) such absolute and precise demonstration. It means only that you have such certainty as in the light of your reason and common sense you believe you ought to rely and act upon.

Each juror of course, in his consideration of the evidence in arriving at a verdict, must make up his or her own mind after consideration of all the evidence as it is recalled, but that consideration should include the views and opinions of fellow jurors as well as those of a individual juror. You are not engaged in a mere poll-taking process where each person in the group makes a final and irrevocable decision without regard to the views of his fellow jurors. It is the essence of the jury system that the jurors will listen to the views of one another and that they will do so with open minds and with a disposition to accept the views of others, if the reasons advanced in the discussion among yourselves by the other jurors are persuasive and are based on the evidence and the Court's instructions.

This, bear in mind, doesn't mean that any juror who, after a consideration of all the evidence and listening to his fellow jurors and paying attention to the instructions which the Court has given, comes to a (2380) firm conclusion as to guilt or innocence as to any charge, should change merely for the sake of conformity or unanimity. That he should not do. It means only that you should listen to and give consideration, with open minds, to the view of your fellow jurors so that, if possible, you may arrive at a unanimous verdict because in this case your verdict must be unanimous.

You may have heard of cases in other courts where less than a unanimous verdict suffices. But I charge you that that is not the law here, and that, in order to render a verdict of not guilty or guilty on any count, your verdict must be unanimous.

Defendant's Further Requests to Charge and Exceptions

You will remember that there are four counts or charges in the indictment. Therefore, you must consider each count and render a separate verdict on each count of guilty or not guilty on the evidence based upon these instructions, and upon the evidence alone.

Now, ladies and gentlemen, there was handed to me this morning, before I came into court, a request by the defendant to make a charge, which I think is already inherent in what I have said, but so there will be no question about it, I charge you: (2381) The reasonable fees paid an attorney in connection with tax matters, such as preparation of income tax returns, are deductible and you may consider from the evidence whether or not the Government, in making up those latter estimates of what the true tax, as they claim, should be, whether or not the Government didn't give credit for those fees for services.

I am going to ask you to retire for a few minutes in order to give counsel for both sides an opportunity to call my attention any error of law which they think they found in what I have said, or to suggest to me some point of law which they think I should bring to your attention and which I have failed to do.

So I ask you now to adjourn to your room, but, please, do not undertake consideration of the evidence. I will call you back. So that if there is any additional instruction which needs to be given to you, it may be covered. And then I will submit it to you. You are to withdraw now but do not undertake consideration of the case until I call you from the jury room to the court room.

(Jury retired.)

Mr. Connelly: If your Honor please, I except to your charge as to reasonable doubt and request that (2382) you charge as in our No. 5, and ——

The Court: Wait until I have a look at it, Mr. Fennelly. That is original No. 5, not the supplemental?

Mr. Fennelly: Original 5, your Honor.

The Court: I decline so to charge, and you have an exception.

Mr. Fennelly: And I except.

And, similarly, as to your charge covering our requests numbers 6 and 7. I request that you charge 6 and 7 of our original.

The Court: I decline to charge in accordance with your request No. 6. You have an exception.

Mr. Fennelly: I except.

The Court: I decline to charge in accordance with your request No. 7, and you have an exception.

Mr. Fennelly: Then I except to your Honor's charge about circumstantial evidence and request that you charge the jury as in our request No. 16, 17 and 18.

The Court: I decline to charge in accordance with request No. 16, and you have an exception. I decline to charge in accordance with your request No. 17, and you have an exception.

I decline to charge—did you also include 18, Mr. Fennelly? I thought you did.

(2383) Mr. Fennelly: I am about to put 18—

The Court: I thought you did.

Mr. Fennelly: Yes, I think I did put 18 in. Yes, I did.

The Court: If you didn't, it is in now! I decline to charge in accordance with your request and you have an exception.

Mr. Fennelly: I will also except to your Honor's refusal to charge our numbers 19 and 20.

The Court: You mean the fact that I didn't charge—

Mr. Fennelly: As requested.

The Court: —as requested in there? By that you mean precisely as you requested?

Mr. Fennelly: Yes.

The Court: I think that charge has been adequately covered, but, in any event, you have an exception.

Does that include your exceptions?

Mr. Fennelly: That is all.

The Court: Very well. Recall the jury.

(Jury present)

The Court: There will be no further instructions, ladies and gentlemen. And now the alternate jurors have come to the end of their service. You will now (2384) be discharged because the case will be left with the twelve jurors. The fact that you will not be required to participate in the deliberations, I hope, won't make you feel badly, because you have really done your duty and you were ready to move in and become one of the regular jurors if that should have become necessary.

So you are discharged with the sincere thinks of the Court. You may withdraw.

(Alternates leave jury box)

The Court: And, ladies and gentlemen, will you take your wraps and withdraw from the jury room so you will not be there at any time during the discussion?

I will rely on the able marshal to see that is carried out.

(Alternates retire from the court room)

The Court: I have one further statement to make to you, it is not part of the charge, but the Clerk will supply you with some memorandum paper, and if there is any exhibit that you wish to have, you may have it; and you may have all of the exhibits, if you wish them.

All right, swear the marshals.

Jury's Request for Certain Exhibits

(Male deputy marshal and female deputy marshal sworn.)

The Clerk: The jury may retire.

(2385) (Jury retires at 11:25 p.m.)

(11.45 a.m.:)

The Court: I have a note here from the jury in which they ask for Exhibits 362 and 363.

Will the Government get those, please?

And then Exhibits III and JJJ. Those are defendant's exhibits.

Do you have those there, Mr. Fennelly?

And income tax returns 1946 through 1949. I assume those are the exhibits 1, 2, 3 and 4, Government's exhibits.

And then, also, and I am quoting here "Government tax return as prepared by the Government, 1946 to 1949."

I assume that is in that last series, 364, 365, 366 and 367.

Mr. MacMahon: Yes, your Honor.

The Clerk: Government's Exhibits 362, 363. Defendant's Exhibits III, JJJ, and the other exhibits, Government's Exhibits 1, 2, 3, 4; 365, 366, 367, 368.

The Court: Let Mr. Fennelly check those.

Mr. Fennelly: Your Honor, did they say income tax returns for 1946 through 1949?

The Court: Income tax returns 1946 through 1949. And then a separate item—you may look at it.

Mr. Fennelly: No. The only reason I say, there (2386) was a return, a separate return of Mrs. Costello for '46.

The Court: That should be included.

Mr. Fennelly: I would assume that should be included.

The Court: Oh, yes. Yes.

Jury's Request for Certain Exhibits

The Clerk: What exhibit number is that, Mr. Pierpoint?

Mr. Pierpoint: Exhibit No. 5.

The Clerk: 5. Thank you.

The Court: Now, Mr. Fennelly, you may look at the exhibits to check to see they are getting what they want, but I can't let you have the time to go over them and examine them in detail.

Mr. Fennelly: Excuse me, your Honor.

The Court: Now, the next item asked for, and again I am reading from the message, "All the statements given by Costello, 1937 and 1939."

Mr. Fennelly: Exhibits 23 and 30.

The Court: And the next item is, ledger pages of Louisiana Mint Company, December, 1945, January 1946.

What are the exhibit numbers?

Mr. Pierpoint: 151 and 152, your Honor.

The Court: All right. Let Mr. Fennelly look at them.

(2387) Mr. Fennelly: Could I have 150, too?

(Mr. Pierpoint hands photostat to Mr. Fennelly)

The Clerk: This is 150, your Honor.

The Court: All right.

Mr. Fennelly: I don't know whether they called for that.

The Court: Well, they didn't describe them by exhibit numbers. They said ledger pages of Louisiana Mint Company December, 1945, January, 1946.

Is it your contention, Mr. Fennelly, that 150 has some bearing on the others?

Mr. Fennelly: Yes. This is the partner account from November—it has entries showing November.

The Court: That deals with that question of whether or not—

Mr. Fennelly: That is right.

The Court: —that payment was made in December, 1945, or in 46.

Mr. Fennelly: That is right.

The Court: Yes. Well, all right, we will send that along.

Mr. Fennelly: I don't know whether they asked for Murphy.

The Court: Yes, they have also asked for the report from Murphy to Costello on Louisiana Mint (2388) Company.

Now, Mr. Clerk, will you take this sheet that came from the jury and mark it Court's Exhibit, whatever the number is, and give it to the reporter so that he can check it?

The Clerk: Court's Exhibit No. 4 for identification, I am sure.

The Court: All right, whatever it is.

(Marked Court's Exhibit 4 for identification.)

Mr. Fennelly: Defendant's Exhibit X.

The Clerk: Is that all?

The Court: All right. Now, let the record show that all of the exhibits requested have been assembled and examind by counsel for both sides and that the marshal has brought them to the jury room.

(Recess)

(12:17 p.m.:)

The Court: Government's 153, it says on this paper. I assume that means the jury wants it.

What is 153? Is that the summary?

Mr. Pierpoint: That is the summary of the Louisiana books by Charles B. Murphy.

The Court: Who is this made by?

Jury's Request for Certain Exhibits

Mr. Pierpoint: Charles B. Murphy, your Honor.

The Court: Oh, yes.

(2389) Mr. Pierpoint: The accountant from New Orleans.

The Court: All right.

(Exhibit 153 sent to the jury)

(Recess)

(At 12.45 p.m. the Court was recessed until 2 p.m.)

AFTERNOON SESSION

(Jury returned from lunch and resumed deliberations at 2 p.m.)

(At 2.30 p.m. the following occurred, the jury not present:)

The Court: This is just a note for some exhibits. Mark this.

(Marked Court's Exhibit 6 for identification.)

The Court: The jury wants six copies each of the following exhibits, 362, 363, III and JJJ.

You did have photostatic copies of III and JJJ, did you?

Mr. Fennelly: Yes.

Mr. Delaney: We have one.

The Court: You did have some during the trial?

Mr. Delaney: We didn't bring them down.

(2390) Mr. Fennelly: Yes.

Mr. Delaney: We can send for them, your Honor.

Jury's Request for Certain Exhibits

The Court: The Government has copies of 362 and 363, and I have the copy you let me have, Mr. Fennelly. The originals are in.

Mr. Fennelly: The originals are in. I have one of each here.

(Discussion amongst counsel)

The Court: Here is an extra copy of the one you let me take, of III and JJJ.

Mr. Fennelly: Three sets each we have, of III and JJJ.

Mr. Christy: And five each of these (indicating).

The Court: I suggest, then, that you send the jury three sets of each, three sets of 362 and 363 and whatever you have of III and JJJ, and, if it wouldn't take too long, Mr. Delaney said you could get some additional copies.

He has probably gone out to call for them—

Mr. Fennelly: I think he has gone out to call.

The Court: —and when they arrive, we can send them to the jury.

Will you tell them, Mr. Marshal, those are the only ones which are available now but additional copies are being sent for and will be made available (2381) as soon as they arrive?

Have you sent for those other copies, Mr. Delaney?

Mr. Delaney: I did. They ought to be down in about 15 or 20 minutes.

The Court: All right, thank you.

(Further discussion amongst counsel)

Mr. MacMahon: Let me see all these (indicating).

Mr. Seymour: Your Honor, we have located another set of Defendant's Exhibits III and JJJ, which would make four of those.

Jury's Request to Examine Certain Testimony

The Court: All right. Then send four of III and JJJ and four of 362 and 363.

(Further discussion amongst counsel)

The Court: You are sending four sets of each, are you?
Mr. Pierpoint: That is right, sir.

(4.02 p.m.—jury not present)

The Court: I have another note here.
"We would like Mr. Pierpoint's cross examination of Mr. Sweeney with the difference," it looks like, "of Exhibits III and Government's Exhibit 362 read to us."

(To the Clerk) Mark that.

(Marked Court's Exhibit 7 for identification.)

(2392) The Court: Now, we have the minutes here. That is about 100 pages of testimony, from pages 2126 to page 2235. So if the reporters are willing to work in relays we will have it read to them, unless you gentlemen have some other suggestion as to the reading.

(No response)

The Court: I hear none. So that will be read by the reporters. You may start in whatever order you wish.

(Jury returned to the court room at 4.05 p.m.)

Deputy Marshal: Your Honor, here is another note that they gave me on their way out.
The Court: Very well.
Will it be agreeable to the jury if this exhibit that you

have asked for here is given to you after you have had the reading of the cross examination?

You make available Government's Exhibit 212 which the jury has asked for and have it available so that they may have it after the completion of the reading.

Very well.

Mr. Reporter, will you read the testimony, the cross examination?

(2393) (Testimony read as requested)

The Court: Ladies and gentlemen, you asked for the part of the cross examination that was conducted by Mr. Pierpoint. Did you intend also to get Mr. Seymour's?

The Foreman: That was all for now.

The Court: Very well. You may withdraw.

The Clerk: Exhibit 212.

The Court: Yes. You get Exhibit 212 which the jury asked for and let the foreman take it back.

Time for dinner pretty soon.

(Jury retired to resume their deliberations)

The Court: Was the foreman given 212?

Mr. Pierpoint: Mr. Fennelly has it.

(Government's Exhibit 212 sent in to the jury)

(At 5.55 p.m. recess for dinner was taken)

(At 8.40 p.m. the jury returned to the court room and the following occurred:)

The Clerk: Jurors will please answer to their names in the order in which they are called:

(Roll call)

Verdict

The Clerk: Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find?

(2394) The Foreman: We, the jury, find the defendant guilty on three counts, Count No. 2, 1947; Count No. 3, 1948; Count No. 4, 1949; Count No. 1, 1946, not guilty.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded.

You say you find the defendant guilty on Counts 2, 3 and 4 in the indictment as charged, and not guilty on Count 1, and so say you all?

Mr. Fennelly: Will your Honor poll the jury?

The Court: Yes.

(To the Clerk) Poll the jury.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded.

You say you find the defendant guilty on Counts 2, 3 and 4 as charged in the indictment, and not guilty on Count 1?

(Each juror responded in the affirmative.)

The Court: Very well.

Ladies and gentlemen of the jury, you are discharged with the quite sincere thanks of the Court for the care and attention that you gave to the reception of the evidence in this case and for the more than ten hours that you have devoted to the consideration of the evidence before you arrived at this verdict.

(2395) You are discharged with the thanks of the Court.

If any of you desire to be excused from jury duty, you may be excused from jury duty for a period of three years.

You may leave.

(Jury retires)

The Court: Any motions?

Mr. MacMahon: Your Honor, I move to remand the defendant.

The Court: Do you desire to be heard, Mr. Fennelly, on the motion?

Mr. Fennelly: Yes, your Honor. I would ask that you continue bail until the time of sentence, if you would see—

The Court: I don't hear you.

Mr. Fennelly: I wish you would continue the defendant in bail until the time of sentence, until he can attend to his—

The Court: When would you suggest for sentence?

Mr. Fennelly: Whenever your Honor sees fit. Sometime beginning next week?

The Court: I would be prepared to impose sentence tomorrow.

Mr. Fennelly: Could you wait until Monday?

The Court: I suppose I could wait until any time (2396) but you asked me when I was prepared to do it.

Mr. Fennelly: Give the defendant an opportunity to arrange his—

The Court: I will hear you on that. Monday?

Mr. MacMahon: Well, your Honor, Monday is all right, if your Honor sees it that way. All of us are pretty tired after this long trial and the sooner the better, as far as we are concerned.

The Court: Maybe it would be better for all of us if we wait until Monday for the imposition of sentence, but I will not grant the motion to remand this defendant. I will permit the defendant to remain on bail until Monday.

Mr. MacMahon: Would your Honor increase the bail to $50,000? The bail at the moment is $5,000.

The Court: What is the bail now?

Mr. MacMahon: $5,000.

The Court: I will increase the bail to $25,000. I think that is adequate. There is no question, is there, that this defendant has disappeared at any time that he was required to be present?

Mr. MacMahon: No, your Honor, but I think the proof has shown that he is a man of substantial means and he now has been convicted of this crime. I don't (2397) think $25,000 is enough to assure his presence here for the sentencing.

Mr. Fennelly: Mr. Costello has been around before, as you have seen. He has testified voluntarily both before revenue agents and before grand juries whenever called; been on trial before and he has always responded when required.

And I don't think there is the slightest question that he would be here. At this late hour of the night it is impossible to supply any additional bail.

The Court: I will grant you until 11 o'clock tomorrow morning to produce the additional bail.

But I think, under all the circumstances, Mr. MacMahon, that $25,000 is quite adequate bail for this man.

If you have any information that—that bail, of course, will limit him to the Southern District. He is not going to have any extension of the bail limits.

Mr. Fennelly: Would your Honor include Long Island, where—

The Court: Where he has his home?

Mr. Fennelly: His home.

The Court: In the Eastern District. Yes, I will (2398) do that.

Mr. Fennelly: He goes to the Eastern District—

The Court: But if you have any evidence which would support a suspicion that this man is not likely to be present for sentence, I would like to hear of it.

Motion to Set Aside Verdict

Mr. MacMahon: No, your Honor, I have nothing to indicate that kind of thing.

The Court: Very well.

Mr. Fennelly: Will your Honor extend time to make motions, too, until—

The Court: Until Monday?

Mr. Fennelly: —Monday?

The Court: Yes, I will do that. I will hear the motions on Monday, and sentence will be imposed on Monday, and the defendant is continued on bail, which, however, is increased to $25,000, and you have until 11 o'clock tomorrow morning to post additional bail.

Mr. MacMahon: Is he in Mr. Fennelly's custody until then?

The Court: No, he is not. He is on that bail that he is on now.

Very well.

(Adjourned to May 17, 1954.)

(2399) New York, May 17, 1954;
11.00 o'clock a.m.

The Clerk: Matter of United States of America v. Frank Costello.

Mr. MacMahon: Your Honor—

The Court: I think Mr. Fennelly has some motions that he wants to make.

Mr. Fennelly: I move to set aside the verdict and for a new trial on the ground that the Court erred in denying the defendant's motion for a judgment of acquittal at the close of the Government's case and of the entire case; and that the verdict is contrary to the weight of the evidence

and that the verdict is not supported by substantial evidence.

The Court: Is that one motion?

Mr. Fennelly: Well, these are separate motions; these are the three separate motions. I did not know whether—

The Court: The first motion to set aside because of the denial of the motions made at the end of the Government's case and at the end of the whole case, (2400) that motion is denied.

What is the next motion?

Mr. Fennelly: The second motion is that the verdict was contrary to the weight of the evidence.

The Court: That motion is denied.

Mr. Fennelly: That the verdict is not supported by any substantial evidence.

The Court: That motion is denied.

Mr. Fennelly: The Court erred in failing to dismiss the indictment on the ground that there was no competent evidence before the grand jury.

The Court: That motion is denied.

Mr. Fennelly: On the ground that the Court erred in refusing to permit cross examination of the witness Ronayne as to whether he had testified before the grand jury.

The Court: That was taken care of, as I recall it, by the Government's stipulation that he did not. The record, as I recall it, also shows that at your request the Court examined the minutes of the grand jury and advised you that there was nothing in the grand jury minutes by Ronayne contrary to anything that he had testified on the stand. The motion is denied.

Mr. Fennelly: And on the further ground that the Court erred in refusing to permit cross examination (2401) of the witnesses Leath, Murphy and Sohn as to contradictory statements made before the grand jury.

The Court: I don't recall any such request having been made.

Motions

Mr. Fennelly: Yes, your Honor. I examined each one and you sustained the objection.

The Court: Will you indicate to me in the record where that occurred? I recall you asking each one—just a minute; I recall you asking each one of them whether or not he had testified in the grand jury and getting a responsive answer. I recall no instance where you asked that the Court examine the grand jury minutes to see whether or not there had been any contradictory testimony. I may be wrong about that, but that is my recollection. I wish you would point out, if I am wrong about it I wish you would indicate to me where that occurred in the record.

Mr. Fennelly: I haven't a note of it. I will have to look at the minutes. It is my recollection that that occurred with each witness and also as to—

The Court: It is not mine, and on that state of the record I will deny the motion.

Before we go any further, Mr. MacMahon, do you have any recollection of that?

Mr. MacMahon: I have a distinct recollection (2402) that no such request was ever made, your Honor.

The Court: That is mine. Yes. All right. The motion is denied.

Mr. Fennelly: The Court erred in not permitting cross-examination of the witness Leath on assessments of additional income for the years 1941 and 1945.

The Court: Motion denied.

Mr. Fennelly: And further, that the Court denied the admission of the assessments of additional income for the years 1941 and through 1945 in evidence.

The Court: Motion denied.

Mr. Fennelly: That the Court erred in denying the motion for a mistrial but the defendant was prejudiced in his right to a fair trial in view of the two newspaper comments that had been introduced as defendant's exhibits for identification.

The Court: Motion denied.

Mr. Fennelly: The Court erred in admitting the exhibits which are the charts of the Government and in failing to strike these charts which include, among others, Exhibits 362 through 365-A to C.

The Court: Motion denied.

Mr. Fennelly: On the further ground that the Court erred in refusing to charge the jury as requested by the defendant as to reasonable doubt and circumstantial (2403) evidence.

The Court: Motion denied.

Mr. Fennelly: That the Court erred in failing to grant a bill of particulars at the opening of the trial and a delay of the trial in order to permit the proper preparation of the defense.

The Court: Motion denied.

Mr. Fennelly: And I also move an arrest of judgment on the ground that there was no competent evidence before the grand jury upon which an indictment could be predicated; the indictment, therefore, is unlawfully founded.

The Court: That motion is denied.

Do you desire to be heard, Mr. MacMahon?

Mr. Fennelly: I beg your pardon?

The Court: No. I am asking Mr. MacMahon if he desires to be heard. I assume that that—

Mr. Fennelly: Yes.

The Court: —represents all the motions you desire to offer.

Mr. Fennelly: Yes.

Mr. MacMahon: Is your Honor ready to hear recommendations with respect to sentence?

The Court: Yes. If you have any recommendations to make I will hear them.

(2404) Mr. MacMahon: This defendant has been found

guilty by a jury of seven men and five women of having wilfully attempted to defeat and evade the payment of $51,000 in income taxes. Three distinct crimes. In 1947 he evaded the payment of $22,563 in income taxes. In 1948, $13,786. In 1949, $14,746. This involved the filing of three separate false and fraudulent income tax returns. During this period Frank Costello concealed at least $140,000 of his income, over half of his income.

The evidence at the trial plainly demonstrated that the amount of income proved was only a minor fraction of Costello's true income for these years. For years, Frank Costello has schemed and calculated to cheat the Government out of taxes. He has deliberately concealed the receipt of his income, the true amount of his income, the source of his income, and the actual use of his income in expenditures and investments.

We have shown the defendant's studious use of cash in every transaction where it was possible and that he resorted to checks only when absolutely necessary, and that even then he used accommodation checks of third parties.

We have shown a long pattern of investments made in the names of friends, attorneys and business (2405) associates.

We have shown that the defendant's tax evasion has not been limited just to the $51,000 for which he stands convicted. During the trial the evidence showed that from 1937 through 1949 Costello deliberately understated his income by at least $202,000, and that this also was only a minor fraction of his income. It was clear from witness after witness on the stand that the defendant had dealt largely in cash and that what records had been made had long since been destroyed.

Now, the statute of limitations bars prosecution for these earlier tax evasions, but it does not take away from the fact that Costello has been a substantial and a deliberate and a repeated tax evader.

As long ago as 1932 Costello had his first brush with the Department of Internal Revenue, because up to that time he had never filed any income tax return at all. At that time, taxes, penalties and interest were assessed for the years 1926 through 1932. These were years when Costello was a bootlegger, a rum runner and had a large slot machine operation in New York City with his partner, the convicted criminal, Dandy Phil Kastel. Three years later, after Mayor LaGuardia ran Costello out of New York, Costello made a deal with (2406) Huey Long and sent—

The Court: Now, Mr. MacMahon, I am not interested in the history of what Senator Long, of Louisiana, did, and the history of what Mayor LaGuardia did is of no interest in this case here. You may tell me all you wish to tell me about the defendant Costello. The political history of 1930 in the City of New York and the political history in Louisiana is something I am not interested in.

Mr. MacMahon: In 1935 they set up, he and Kastel set up, a large slot machine business in New Orleans, and that was a straight cash business. The testimony during this trial shows that.

For over twenty years Costello has been represented by accountants and lawyers in connection with tax matters. Yet he has persisted in carrying on his financial operations in devious and mysterious ways, carefully calculated to hide his true income and thwart investigation by Government agents. Investigating the evidence in preparing this case for trial was a colossal undertaking because Costello's concealment was so thorough. Even after years of most painstaking investigation Government agents were not able to identify the specific source of the unreported income which the jury has found Costello received.

(2407) Costello has spent a lifetime making money on the shady side of the law. He has been the banker for one unlawful enterprise after another, bootlegging, slot machines, book making, gambling casinos and the like.

His business associates and his friends have been open and notorious underworld characters, men like Frank Erickson, Joe Adonis, Meyer Lansky, Lucky Luciano, Carlos Marcello, Longie Zwillman, the late Willie Moretti. The list is like the Who's Who of crime in the United States.

He has achieved such an eminent position in his chosen field that he was able to command 15 thousand a year to keep bookmakers off the Roosevelt Raceway.

To the man in the street, Costello is the symbol of the successful racketeer who year after year has flaunted the law and gotten away with it.

The kind of enterprise that attracks Costello and his friends provides the greatest threat to the effective enforcement of the revenue laws of this country. These are the businesses where the money comes big and easy. These are the businesses where it is easy to cheat. These are the businesses where you have no record of gross receipts and cost of sales. These are the businesses where the customer can't be (2408) found, or if he can, he won't talk.

The sentence Frank Costello receives is of critical importance to the administration of the internal revenue laws of this country. The sentence he receives will stand as an example for the easy money boys who are Costello's friends and associates and admirers, and also for everyone else who is tempted to deal in cash and cheat the Government.

Frank Costello all his life has flaunted the standards of law and order. He now stands at the bar of justice to receive his just punishment.

The overwhelming majority of the American citizens are engaged in honest occupations and file honest income tax returns.

For these reasons the Government recommends that when a man like Frank Costello is caught and convicted after due process of law, his punishment should be severe.

In cases of this nature and under like circumstances the courts have not felt limited to the maximum penalty on any one count.

If there were ever a case where maximum sentence for defrauding the Government was justified, this is the case, your Honor. Because of the facts before the Court and in view of the considerations I have referred to, the Government recommends the maximum sentence (2409) permitted under the three counts, such jail sentence to be served consecutively and not concurrently. In addition, the Government recommends that the maximum fine of $10,000 on each count be imposed, and that the defendant be assessed for the cost of this prosecution as provided by statute.

The Court: Are you prepared to state what the cost is, Mr. MacMahon?

Mr. MacMahon: Your Honor, we would be prepared to submit a bill of costs and taxing costs in accordance with the statute. Not at the moment.

The Court: I am just wondering whether you could tell me about what that is. If you can't, it is all right.

Mr. MacMahon: I can't give you the exact amount, your Honor.

The Court: Very well.

Mr. Fennelly: May it please the Court, Mr. Costello, I think, as appears from the evidence in the case, which I shall not discuss, merely by way of answer, but some of the matters that have been brought to your Honor's attention, that, for example, the slot machine business which has been condemned as unlawful, the Government took its share of the taxes and those taxes were reported by these businesses that did cash business, (2410) Bayou Novelty, for example, in the years 1936 and 1937, had over a half million dollars in 1936 and $471,000 in 1937, substantial amounts. I think my years are in error. They

should be 1933 and 1936. But the point is that the business that have been condemned as being cash businesses and unlawful because they were slot machines, they reported sizable amounts, and that there has been no proof anywhere that those amounts were not accurate, and if they were illegal businesses the Government took its share of the taxes. There has been no proof in the case as to a single dollar of unreported income, I mean.

The Court: Didn't the jury find against you on it?

Mr. Fennelly: Yes. What I mean is, direct income. What I want to point out is that where they say the possible sources of income, in two of the years Mr. Costello reported wagers. Now, he did not have to report anything on the subject were it not so, I mean as far as traceability is concerned. The Government argues that he only reported where it could be traced to the source. There are two instances in 1948 and 1949 where he reported on his return his profits on wagers, on which there would be no traceable source but he reported them. Now, the Government says, well, (2411) maybe he had more from that source. It seems to me that in the Government's own argument to you this morning that he was a bootlegger back in the days when they made much money, that is hard to believe that some of that money which goes back prior to 1933 had not remained with the defendant's wife. In those early years, from 1926 through 1932 there was no gift tax; a man could perfectly lawfully give his wife funds. And it would be wholly consistent with his statement in 1937 as to his assets that she would still have funds going back from that period.

As to Mr. Costello himself, he is a man 61 years of age, married 40 years, has on every occasion taken up the work of raising funds for various enterprises, the Legal Aid Society, Salvation Army, Catholic Boys Brigade, Catholic Boys Town, in Italy, and a host of others. And I think